Supreme Court, U.S.
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No. 931404 MAY 19 1993

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BRENDA MARTIN,

Petitioner,

v.

FLORIDA POWER CORPORATION

Respondent,

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Brenda Martin
Petitioner, pro se
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119 pp

QUESTION PRESENTED FOR REVIEW:

Does Florida Power Corporation have the authority to deny Petitioner her Civil and Constitutional Rights, which include the right to be represented by an attorney, whether by mail or in person, when they are fully aware that their fraudulent set up with open cash trays, no lids, no locks, against Petitioner did not warrant any criminal charges by the Police Dept., and also knowing the Police Dept. was not conducting an investigation, because there was nothing to investigate per the Police Report dated June 13, 1988 and per affidavit of police detective that came to Florida Power per their fraudulent report to the police, stating suspect did not have access to the safe and cash tray that was marked with dye by Florida Power Corporation?

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May 11, 1993

United States Supreme Court Justices
Washington, D. C.

RE: Appeal of Brenda Martin's Case May Set a Legal Precedent

Honorable Supreme Court Justices:

In the case of Brenda Martin vs. Florida Power Corporation, the Appellant, Brenda Martin is appealing the decision of the lower court in favor of Florida Power Corporation on the grounds that issues and supporting facts, germane to the case, appear to have been overlooked in arriving at a ruling. As a result, Brenda Martin is of the opinion that her constitutional rights, affording her "Freedom of Speech" and "The Right to be represented by an Attorney", have been denied.

It is an integral part of the Judiciary's role to settle cases in which there is a perceived injustice, through the objective examination of all facets of the case as they pertain to relevant laws and existing precedents. Through this procedure, justice and fair play should prevail in spite of any disparity in influence, status and resources between the parties in dispute.

If there are no legal precedents which adequately match the circumstances of this particular case, then it may be in order for a ruling to be made which would set a precedent. There is factual evidence to support allegations of harassment, discrimination, and unfair dismissal of Brenda Martin by her former employers, Florida Power Corporation.

In this case, the evident contradictions and discrepancies which remain unresolved, need to be addressed without prejudice. An appeal is therefore being made to the highest level of the Judiciary to review the facts of the case, subsequent actions taken and decisions made and

arrive at an equitable Judgement.

Sincerely,

Richard W. Mims, Pastor
First Christian Church
of The Living God
P.O. Box 261105
Tampa, Florida 33684
(and other concerned citizens)

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BRENDA MARTIN,

Petitioner,

v.

FLORIDA POWER CORPORATION,

Respondent,

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Eleventh Circuit

HONORABLE JUSTICES OF THE SUPREME Court:

Petitioner, Brenda Martin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit refusing to allow "Good Faith" letter to Respondent, per her atty., to serve as contact to respondent, after she had been suspended from work without

pay, even though police report shows no criminal charges could be brought against her, because she was performing her regular, legal job duties in the same manner during her 6½ years of employment. There was no police investigation, Respondent stated on depositions, there was.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as Brenda Martin v. Florida Power Corporation, No. 92-2204, and appears in Appendix A to this petition. The opinion of the District Court for the Middle District of Florida on the Initial complaint and the Motion for Reconsideration appears in Appendix B. The Police Report and Affidavit of Detective Keith Jenneke, from Police Report, June 13, 1988 appears in Appendix C. The

Motion for Reconsideration, and Supplemental Memorandum of Law concerning disputed issues of law appears in Appendix D. The letter concerning break time, issued to all employees after Petitioner's Internal Complaint to Respondent's EEOC Dept. and the resolved EEOC complaint through City of St. Petersburg, dated March 1987 also appears in Appendix D. The First Amended Complaint, the Letter to Respondent per Petitioner's Attorney, the Letters Petitioner received in one envelope on June 18,1988, and Respondent's Termination Letter to Petitioner appears in Appendix E.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on February 18, 1993. This court's jurisdiction is conferred by 42 U.S.C. 2000 E-5.

Equitable and other relief is sought under 42 U.S.C. 2000 C-5 (g).

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

Memorandum of Law Concerning Disputed Issues of Law and Supplemental Memorandum of Law In Support of Plaintiff's Motion for Reconsideration is set forth in Appendix D. Amendments I, V, and VI are set forth in Appendix E. Summary Judgment Rule 56 is set forth in Appendix E.

STATEMENT OF THE CASE

The United States District Court, Middle District of Florida, had Jurisdiction as conferred by 42 U.S.C. 2000 E-5. Equitable and other relief sought under 42 U.S.C. 2000 C-5 (g).

On June 13,1988 the St. Petersburg Beach Police Department was notified by Respondent, Florida Power Corporation, stating money was reportedly missing from Florida Power in recent past so security placed powder on money tray and SUS who reportedly had no right to be in this drawer had blue dye from this on her finger. No theft noted at this time. After Police Detective arrived at Fl. Power, he and Fl. Power security, Henry Ehrmann interrogated Petitioner, Brenda Martin. Henry Ehrmann started off interrogation by stating Petiticner's name had come up

before in missing monies, most recently in "1986". Petitioner asked during interrogation if she could demonstrate the way she has to remove her tray from the safe each day. During the voluntary demonstration Petitioner attempted to speak to Walter Fuller, District Manager and Barbara Moore, Office Supervisor, who were standing by a file cabinet looking on, and wouldn't say anything. Petitioner was telling them they knew this is the way she has to remove her tray every day during the 6½ years she's been employed, Henry Ehrmann interrupted Petitioner, he yelled at her to "Shut Up, Be Quiet", he's handling this! This statement to Petitioner was in violation of her Civil Rights under 42 U.S.C. 2000 and her Constitutional

Rights under Amendment I to the Constitution of The United States, which gives her the Right to Freedom of Speech, the right to say what he or she thinks. After Petitioner did her voluntary demonstration, Henry Ehrmann informed her she was on suspension without pay and that she could only return to work if the thumb print that was found, proved not to be hers.

Your Honor, the cash trays are open trays, no lids, no locks, the Petitioner's tray was on the very bottom of the marked tray that was flushed on top of her tray. The Petitioner had just demonstrated why she had a legal right for the thumb print to be hers, in order to remove the tray flushed on top of hers she had to incorporate the use of her thumb. Petitioner is black.

The Petitioner was informed by Ehrmann that she needed to go over to the police dept. with the detective. The Petitioner asked if she could drive her car and she was told by Henry Ehrmann, she could not, she needed to ride in the back seat of the detective's car. Before Petitioner left, she asked if she could call someone to pick up her children from summer care, Henry Ehrmann told her she could, Walter Fuller followed her to the lobby where the phone was a few feet away, he stood by and listened to her conversation. Your Honor, the Petitioner was made to feel like a criminal, even though she had not taken or attempted to take anything. According to the Civil Rights Rules, the Intent of Discrimination should not be present, if present

then this is termed Intent to Discriminate. Intent to Discriminate is against the law. The Petitioner has shown that respondent displayed Intent to Discriminate. Your Honor, please review the Police Report in Appendix C, the report clearly states no criminal charges can be brought against Petitioner. Respondents stated on their depositions that the police dept. was conducting an investigation and Petitioner did not cooperate, this was not a true statement on their depositions.

The Petitioner mailed a letter, per her attorney to Respondent on June 18, 1988 and they received by certified mail on June 20, 1988. The Respondents terminated Petitioner on June 21, 1988, even though her letter clearly stated per her atty., this

letter was sent in "Good Faith", to the Respondent. The Petitioner was in no way being insubordinate as Respondents stated. If Respondents needed more information then why didn't they request it the same way they sent the letter to Terminate Petitioner, by same day restricted delivery. Respondent violated her right to the VI Amendment.

Petitioner decided to contact an attorney because she knew her Civil and Constitutional Rights were violated by Respondent.

Your Honor, even though Petitioner was not allowed to talk to Walter Fuller and Barbara Moore on June 13,1988,these were the same two people that came to her home and Petitioner would not open her door or return their calls because she was deathly afraid of what they

would try next. The Petitioner was already in the process of retaining an attorney, to handle the Respondent for their devious acts against her on June 13,1988.

Your Honor, the petitioner's six hundred dollar deposit shortage in "1986", was not the first time a deposit was short after reaching the bank. The first shortage was from a white female's deposit, Beth Duggan. Respondent did not notify police of this shortage. Your Honor, the only time police was notified was when the Petitioner was supposedly the suspect. Beth's deposit was short around two hundred dollars plus. Henry Ehrmann stated on his deposition that the only time he notified police was in "1986" when it involved the Petitioner.

Your Honor, the Petitioner never

heard from Henry Ehrmann after he suspended her, until after she was terminated by Barbara Moore,the person she was not allowed to speak to during the interrogation. He came to Petitioner's home and told her ex husband that was there with their children, to tell Petitioner he had something in a bag to give her after she returned her badge and employee manuals. Petitioner called Florida Power and told Ehrmann's secretary to inform him, she didn't know where the badge and manuals were and if she found them, then she would mail them to Florida Power. Petitioner never did locate the items.

Your Honor, if Henry Ehrmann was in fact the person handling the incident of June 13,1988, then why

did he not contact,or call,or try to contact Petitioner until after she was terminated by Barbara Moore, June 21,1988, after she received Petitioner's Contact Letter on June 20,1988 per her Attorney.

Your Honor the Petitioner knows of another incident in "1987", where Jill Haseltine, a white female was short several hundred dollars and Barbara Moore came to Petitioner to get paper money from her drawer and made copies to present to Jill,as part of her going away gift for the summer. Jill did verify this with my Attorney. Barbara Moore made the missing money into a big joke.

Your Honor, Barbara Moore stated on her deposition that Respondents had a meeting after she went to Walter Fuller, who arranged the meeting, and they stated there

was no contact from Petitioner. Your Honor, this was not true, they received Petitioner's "Good Faith" Contact Letter on June 20, 1988 and Barbara Moore terminated Petitioner by same day restricted delivery on June 21, 1988. The letter to Respondent was per Petitioner's Attorney, the Petitioner does have that Right per Amendment VI to the Constitution and her Civil Rights as a citizen of The United States.

Your Honor, Barbara Moore contends she was not aware of two previous complaints Petitioner had against Respondent. Your Honor both of the complaints were in Petitioner's office file in Moore's office. The last complaint was through the City of St. Pete's EEOC

and was not completed until March, "1987", Barbara Moore became Petitioner's supervisor in January "1987". One could infer that she was very much aware of what was in the file, also when the "87" complaint was resolved, Moore gave the records to Edna Jones, Florida Power's EEOC Representative. Even if Mrs. Moore states she wasn't aware of what was in the files, Walter Fuller is the person the complaints were filed against,and he was very much aware of the two previous complaints. Also Henry Ehrmann was aware of the complaints.

The Courts decided in favor of Florida Power, stating too much time had passed for a retaliation claim. This is not true, from March,"1987" to June 13, 1988 is just over a year.

Your Honor, the Petitioner also wrote a rebuttal to her "87" Review, which Barbara Moore stated she need to be more cooperative in dealing with the other employees, this was September, "87". Moore became upset when Petitioner would not remove the rebuttal letters from her office file. From Sept. "87" to June "88" is only 9 months. The Courts did not calculate the dates Petitioner gave in this case, properly. Her job was abolished.

The rebuttal contained very important information and need to be reviewed by the Courts. The day before Petitioner's "87" Review, Mrs. Moore asked Petitioner into her office. She stated to Petitioner a co worker, Gemma Mender made a complaint about her, Petitioner asked Mrs. Moore if she would bring Gemma

in on this meeting she had called, because Gemma was lying on her, Mrs. Moore refused, but said, she put a comment on Petitioner's Review for the next day,that stated Petitioner need to be more cooperative in dealing with co workers. Your Honor, why would a supervisor go to an employee with a complaint from another employee, and not allow the employees to meet with her in one group to try and resolve the complaint, rather than placing on the one employee's review, she need to be more cooperative with other employees, when nothing like this was ever stated to Petitioner before.

Your Honor, a Review covers from one year to the next, one complaint would not mean the employee doesn't cooperate with other employees. Again Petitioner

was denied Freedom of Speech and her Civil Rights were violated. A white female made the complaint to the supervisor, the Petitioner is black. Barbara Moore was very much out of line to deny Petitioner her Freedom of Speech, after all Moore listened to the white female employee and she believed her, Petitioner was not treated fairly. The Petitioner believes this complaint about the Review, along with the other EEOC complaints is the reason she was retaliated and discriminated against by Respondent.

Your Honor, after all there was no police investigation per the Police Report of June 13,1988. Also there was never any criminal charges brought against the Petitioner, because she was set up by

Respondent. They violated her right to the V Amendment.

Your Honor, the Petitioner has been treated unjustifiably by Respondent throughout these proceedings, for a "Crime" she never committed.

The Police Report is very important, please review. Please review the Motion for Reconsideration, the First Amended Complaint and all of the other information in the Appendix.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Courts did not consider the facts, Petitioner was provoked when she was set up by the Respondent, Petitioner was suspended without pay even though she did a voluntary

demonstration to show why her thumb print appeared, Petitioner was never told to return to work, Petitioner sent a "Good Faith" Letter to Respondent per her Attorney, Petitioner was terminated even though Respondent received her Contact Letter on June 20, 1988 and terminated her on June 21, 1988, Police Dept informed Respondent they could not bring Criminal Charges against Petitioner, Petitioner had won two other complaints against Respondent, Petitioner wrote a Rebuttal against her "87" Review, Moore wanted Petitioner to remove the Rebuttal from her office file, the last EEOC Complaint wasn't resolved until March, 1987, and Moore became Petitioner's supervisor in January, 1937, the Rebuttal was

in September, 1987, the last incident against Petitioner was June, 1988, all of these things mentioned above appear to be reasons Respondent retaliated and discriminated against Petitioner. Her job was abolished.

This Court should grant certiorari here to explicitly rule that the two Lower Courts, did not sufficiently review the genuine issues in dispute, Summary Judgment R.56. Petitioner was suspended without pay by Respondent, even though Police Report show no criminal charges could be brought against Petitioner, there was no police investigation, Petitioner was never told to return to work after the suspension, Petitioner never heard from Henry Ehrmann after he suspended her, the

Respondent received Petitioner's "Good Faith" Contact Letter per her Attorney on June 20, 1988 and terminated her on June 21, 1988, the last EEOC Complaint against Respondent wasn't resolved until March, 1987 and Barbara Moore became Petitioner's supervisor in January, 1987, also Walter Fuller was present during the interrogation along with Barbara Moore and neither would say anything to Petitioner, Petitioner was told to "Shut Up, Be Quiet!", by Henry Ehrmann when she attempted to talk to Walter Fuller and Barbara Moore, Ehrmann stated he's handling this, Your Honor, if Ehrmann was handling the incident then why did Petitioner not hear from him after he suspended her without pay, and why was she

terminated by Barbara Moore, one of the same people she was not allowed to speak to during the interrogation, in September, 1987, Petitioner wrote two Rebuttal Letters.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals and the Middle District of Florida, in this matter.

Dated:May 17,1993

Respectfully submitted

Brenda Martin

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If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of the fact this is a retaliation discrimination case and whenever there are genuine

issues outstanding then a summary judgment should never be issued, per Summary Judgment Rule 56.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2204
Non-Argument Calendar

D.C. Docket No. 90-858-CIV-T-21B

BRENDA MARTIN, Plaintiff-Appellant,

versus

FLORIDA POWER CORP., Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(February 18, 1993)

Before HATCHETT and COX, Circuit Judges, and Johnson, Senior Circuit Judge.

PER CURIAM:

Brenda Martin, a black female, was employed by Florida Power Corporation in its Gulf Beach district office from 1981 until she was discharged in 1988. She filed a complaint with the Equal Employment Opportunity Commission and received a right-to-sue letter. In Martin's complaint she alleged that Florida Power discharged her because of her race, using as a pretext her alleged failure to cooperate in an investigation of missing funds. She also alleged that the discharge was in retaliation for her earlier complaints with the company's affirmative action department and the St. Petersburg Human Relations Dept. She sought monetary damages, reinstatement, and attorney fees.

After considering Brenda Martin's complaint and the motion for summary judgment filed by Florida Power, the district court granted summary judgment to Florida Power on both of Martin's claims. The record in this case fully supports the facts as found by the district court.

The judgment of the district court is Affirmed.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BRENDA MARTIN,
Plaintiff,
v.
CASE NO.90-858-Civ-T-21
FLORIDA POWER CORPORATION, (B)
Defendant,

ORDER

This cause is before the Court upon the motion of the Defendant, Florida Power Corporation ("Florida Power"), for Summary Judgment (Dkt. #23), filed on October 11, 1991. The Plaintiff, Brenda Martin, filed a Memorandum in opposition to the Defendant's motion on October 28,1991.

Plaintiff, a former employee of Florida Power, alleges that the Defendant terminated her employment (1) because of her race and (2) in retaliation for prior charges of discrimination, both in violation

of Title VII of the Civil Rights Act of 1964, 42 U.S.C.§2000e, et seq., as amended. Florida Power contends that the Plaintiff was terminated for reasons unrelated to her race or any prior claims of discrimination. Following the completion of discovery, the Defendant has moved for summary judgment, asserting that there are no genuine issues of material fact and that, as a matter of law,it is entitled to the entry of judgment in its favor. After thoroughly reviewing the memoranda submitted, the relevant portions of the record and the applicable case law, the Court concludes that the Defendant's motion for summary judgment should be granted.

BACKGROUND

Commencing in November 1981,

the Plaintiff, a black female, was employed by Florida Power in its Gulf Beach district office, where she eventually reached the position of Customer Service Representative. In May 1986, Plaintiff filed a complaint with Florida Power's internal Equal Employment Opportunity Department alleging that her supervisor, Walter Fuller, had discriminated against her in the use of break time due to her race. This complaint was subsequently resolved to the satisfaction of the Plaintiff.

In July 1986, Fuller filed a Written Reprimand against the Plaintiff. Plaintiff, who felt that the Reprimand was caused by her race, filed a Discrimination Charge with the St. Petersburg Human Relations Department. This charge

was resolved through a negotiated conciliation agreement and the Written Reprimand was removed from Plaintiff's file.

On September 9, 1986, Florida Power was notified by its bank that one of its deposits was short $600.00. Five individuals, including the Plaintiff, were questioned by the St. Petersburg Police Department in connection with the subsequent investigation of the missing funds. Each of the individuals agreed to undergo a polygraph examination, with the exception of the Plaintiff, who refused on the advice of Counsel. None of the administered polygraph examinations revealed deception. No subsequent action was taken against the Plaintiff due to her

refusal to submit to the polygraph examination.

In January 1987, Barbara Moore became Plaintiff's immediate Supv. at the Gulf Beach district office. Except for one episode when the Plaintiff was unhappy with Moore's handling of a dispute between Martin and a co-worker, the record indicates that Martin and Moore had a fine working relationship.

In May 1988, Florida Power initiated another investigation due to unaccounted for funds. The specific event which triggered the investigation was the Defendant's discovery that a $10.00 roll of quarters was missing. In an effort to determine how this money came to be missing, blue dye was placed on coin rolls which

were then returned to a tray in a locked safe. On Monday, June 13, 1988, after it was discovered that prints containing blue dye were present on the safe, each of the district office employees were examined for the presence of the dye. Martin was the only individual with blue dye on her hand.

Plaintiff never returned to work for Florida Power. On June 15, Moore and Fuller visited Martin's home on two occasions. Plaintiff, however, refused to answer the door or to return telephone messages. On June 16, Moore and Fuller attempted once again to contact Plaintiff at her home and left another message. Plaintiff did not respond

to these attempts to contact her.

On June 15 and 16, Florida Power sent separate letters to Plaintiff via certified mail. The June 15 letter notified Plaintiff that she was scheduled for a polygraph examination with the St Petersburg Police Department on June 16 and that her failure to cooperate would result in her termination on the grounds of insubordination. The June 16 letter instructed Martin to contact the Defendant by 5:00 p.m. on June 20 and warned her that her failure to comply would constitute resignation without notice.

Plaintiff responded by sending a letter to Florida Power stating that she had been advised by her attorney to communicate with the

Defendant only in writing through the mail. After receiving Plaintiff letter on June 20, Moore determined that the letter was not an adequate response to Florida Power's previous correspondence and, after the 5:00 p.m. deadline had passed, she decided to recommend that Plaintiff's employment be terminated. Florida Power's management subsequently approved Moore's recommendation to terminate Plaintiff. In a letter dated June 21, 1988, Moore terminated Plaintiff's employment due to insubordination based upon her refusal to cooperate in the investigation of the missing funds. Plaintiff's position was thereafter abolished.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P.56(c). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S.317, 327,106S.Ct.2548,2555,91 L.Ed. 2d 265,276 (1986). The standard of review "mirrors the standard for a directed verdict under

Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.s. 242,250,106 S.Ct.2505, 2511,91 L.Ed.2d 202,213 (1986). Although all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, see Matsushita Electric Industrial Corp. v. Zenith Radio Corp.,475 U.S. 574, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986),"the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient: there must be evidence on which the jury could

reasonably find for the plaintiff." Anderson,477 U.S.at252,106 S.Ct. at 2512,91L.Ed.2d at 214.

DISCRIMINATORY DISCHARGE

In Count I of her First Amended Complaint, Martin claims that she was discharged because of her race. Specifically, she contends that the investigation of missing funds was a mere pretext created by Florida Power in order to justify the termination of Plaintiff's employment. Accordingly, Plaintiff's claim of discriminatory discharge is properly analyzed under a theory of pretextual disparate treatment. A Title VII disparate treatment plaintiff must prove that the defendant acted with discriminatory purpose. Texas Department

of Community Affairs v. Burdine, 450 U.S.248,253,101 S.Ct. 1089, 1093, 67 L.Ed.2d 207,215 (1981); Clark v. Huntsville City Board of Education, 717 F.2d 525,529 (11th Cir. 1983).

To prevail, a plaintiff must first establish a prima facie case of employment discrimination on the basis of race. A prima facie case raises the inference that discriminatory intent motivated the employer'ss actions against the employee. The defendant may then articulate a legitimate, nondiscriminatory reason for its action. Plaintiff then has the burden of proving, by a preponderence of the evidence, that the articulated reason was a pretext for discrimination and that the true reason was

intentional discrimination. The burden of proof remains with the plaintiff at all times. McDonnell Douglas Corp. v. Green,411 U.S. 792,93 S.Ct. 1817,36 L.Ed.2d 668 (1973).

Florida Power claims that Martin cannot establish a prima facie case of racial discrimination. A prima facie case of discriminatory discharge may be shown in a number of different ways. A plaintiff fired for misconduct makes out a prima facie case of discriminatory discharge if she shows that she was qualified for the job from which she was fired and that the misconduct for which she was discharged was nearly identical to that engaged in by an employee outside the protected

whom the employer retained. Nix v. WLCY Radio/Rahall Communications, 738 F2d 1181,1185 (11th Cir.1984); McDonald v. Santa Fe Trail Transportation Co.,427 U.S.273,96 S.Ct.2574, 49 L.Ed.2d 493 (1976). Martin, therefore, could establish a prima facie case of racial discrimination by demonstrating that she was fired but that another employee was retained despite engaging in "nearly identical" conduct. Davin v. Delta Air Lines. Inc., 678 F.2d 567,570 (5th Cir. Unit B 1982); Rhode v. K.O. Steel Castings, Inc., 649 F2d 317,322 (5th Cir. 1981).

Under the facts of this case, however the Plaintiff cannot demonstrate that she was fired for insubordination while other Florida Power employees engsged in identical conduct but were retained. Martin

is unable to do so because, in addition to being the only employee to be found with blue dye on her hand, she was the only employee who refused to cooperate in the investigation of the missing funds. In fact, the only employee who arguably could have been alleged to have engaged in identical conduct at Florida Power would be the Plaintiff herself when she failed to fully cooperate with the investigation funds in 1986 but was still retained by the defendant.

Plaintiff has failed to show any evidence of disparate treatment. In particular, she has not demonstrated that Florida Power retained a different employee who engaged in the type of conduct for which was discharged. Although

she alleges that the entire investigation was a fraud concocted by Florida Power in order to justify her termination, the Plaintiff has not provided the Court with any proof, other than her own affidavit, which would support these allegations. In short, the Court concludes that the Plaintiff has failed to prove a prima facie case of racial discrimination because she has failed to come forward with any evidence demonstrating that she was terminated on the basis of race.

Nevertheless, drawing all inferences in favor of the Plaintiff and for the purpose of completely analyzing the Plaintiff's claim of discriminatory discharge, the Court will proceed on the

assumption that she has, in fact, established a prima facie case of discriminatory discharge. With the Plaintiff having shown a prima facie case of discriminatory discharge, the Defendant must demonstrate a legitimate, nondiscriminatory reason for her discharge.

This burden on the Defendant is exceedingly light and is one of production and not persuasion, as the ultimate burden of proving purposeful discrimination by a preponderance of the evidence always remains with the Plaintiff. Smith v. Horner,839 F.2d 1530,1537 (11th Cir.1988). Florida Power has met its burden. It has shown that the Plaintiff was terminated due to her failure to cooperate with an investigation of unaccounted for

funds.

Once a defendant has met its burden of production, the plaintiff must prove by a preponderance of the evidence that the reason offered by the defendant was a mere pretext for discrimination against the plaintiff on the basis of race. Young v. General Foods Corp.,840 F2d 825,829-830(11th Cir. 1988).

As far as demonstrating pretext, the Plaintiff has completely failed to meet her burden. For the most part, Plaintiff does not contest the factual background which led to her termination, and the few factual issues which are alleged to be in dispute are not material. When Martin received Florida Power's correspondence, she realized her

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job was in jeopardy; however, instead of indicating she was willing to participate in the investigation or explaining why she would not, she instructed the Defendant to contact her only through the mail. In the Court's view, the Plaintiff has not shown that the Defendant's decision to terminate her was anything but justified. Plaintiff's conclusory statements suggesting that she was singled out because of her race are insufficient to raise an inference of pretext or illegal discrimination and cannot withstand a properly supported motion for summary judgment. Carter v. City of Miami, 870 F2d 578, 585 (11th Cir.1989); Young, 840 F2d at 829; Grigsby v. Reynolds Metals

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Co., 821 F.2d 590 597(11th Cir. 1987). Therefore, the Court finds that the Defendant is entitled to the entry of judgment in its favor on Plaintiff's claim of discriminatory discharge.

In Count II, Martin claims she was discharged because she had previously filed two charges of discrimination. To establish a prima facie case of retaliation, a plaintiff must show (1) that she was engaged in a statutorily protected activity, (2) that the defendant has taken some type of adverse employment action and (3) that a causal connection exists between the first two factors. Bigge v. Albertsons,Inc.,894 F.2d 1497, 1501 (11th Cir.1990). The first two factors are satisfied here.

Plaintiff was discharged almost 22 months after she filed her second discrimination charge in August 1986. Although Martin ackowledges that the lengthy passage of time weakens any inference of retaliation, she contends that the causal link between the protected activity and her discharge can be clearly inferred. According to Plaintiff's theory, Florida Power intentionally waited to fire her after she filed her complaints so that she would have a difficult time proving any subsequent charge of retaliatory discharge. Beyond this speculative statement, however, the Plaintiff offers no evidence to support her theory of retaliatory discharge.

After discovering the blue dye

on the Plaintiff's hand, the Defendant did not immediately fire Martin. To the contrary, the record shows that, after Martin did not return to work, Florida Power's representatives made diligent efforts to contact Plaintiff seeking her assistance in the investigation of the unaccounted for monies. Only after Martin failed to indicate a willingness to cooperate in the investigation did the Defendant make the decision to terminate her employment. The Court finds that the Plaintiff has failed to establish the requisite causal link between her discrimination complaints in 1986 and her discharge in 1988.

In summary, the Court finds that, as a matter of law, the

Defendant is entitled to the entry of judgment in its favor on both Counts of Plaintiff's First Ammended Complaint. Accordingly, it is

ORDERED AND ADJUDGED that the Defendant's Motion for Summary Judgment (Dkt.23) be and the same is hereby **GRANTED**. The Clerk is **directed to enter** judgment in favor of the Defendant, Florida Power Corporation, and against the Plaintiff, Brenda Martin.

DONE AND ORDERED, at Tampa, Florida, this 16th **day of January, 1992.**

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BRENDA MARTIN,

Plaintiff

v. CASE NO.90-858-Civ-T-21B

FLORIDA POWER CORPORATION,

Defendant

ORDER

This cause is before the Court upon the Plaintiff's Motion for Reconsideration (Dkt. #66), filed on January 24, 1992. The Defendant, Florida Power Corporation, filed a memorandum in opposition to Plaintiff's motion on February 3, 1992. After due consideration of all of the memoranda submitted by the parties in support and in opposition to this motion, as well as the applicable case law, the Court finds that the Plaintiff's motion should

be denied. Accordingly,it is

ORDERED AND ADJUDGED that Plaintiff's Motion for Reconsideration is **DENIED.**

DONE AND ORDERED, Tampa, Florida, this 5th day of February, 1992.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BRENDA MARTIN,
Plaintiff,
v.
FLORIDA POWER CORPORATION
Defendant,

Civil Case No.
90-858-CIV-T98B

AFFIDAVIT OF KEITH JENNEKE

STATE OF FLORIDA

COUNTY OF PINELLAS

Before me this day personally appeared Keith Jenneke, who, being duly sworn, states as follows:

1. I have personal knowledge of the averments contained herein.

2. The attached police report is a summary of my investigation on June 13, 1988 while I was a police officer with the St. Petersburg Police Department.

Further Affiant naught.

Keith Jenneke, Affiant

SWORN TO AND SUBSCRIBED before me this 26th day of October, 1991.

STEPHEN J. FREEMAN, P.A.
NOTARY PUBLIC
My Commission Expires:
December 3, 1993

MISCELLANEOUS INCIDENT REPORT

ST.PETERSBURG BEACH
POLICE DEPARTMENT
Report #884458

OFFICER: DET K JENNEKE
Date/Time: 061388 1600
Total Time: 60 mins

Narrative: Henry Ehrmann Corporate Security Florida Power 3200 34th St S St Pete 866-4246
(Assist other agency,Florida Power)
SUS: Brenda Joanne Martin 4126 31st St S St Pete # 867-0259
DL M635-073-53-866 SSN 262-11-5176

LVI: Latents which were taken by SUS permission. These were taken at Central

3 latent lifts that were made with blue dye on fingers.

1 dye blue finger print off phone receiver which appeared to have been made with left thumb.

(Taken off SUS phone)

1 dye blue fingerprint taken off the left side of the safe approx 1/2 way up safe.

1 dye blue fingerprint taken off the

top of the safe.

SYN: Money was reportedly missing from Fl Power in recent past so Security placed powder on money tray and SUS who reportedly had no right to be in this drawer had blue dye from this on her finger. No theft noted at this time.

INVEST: WRITER responded to Central and met with Henry Ehrmann who requested assistance in invest of possible theft.

WRITER then responded to 575 75th Ave SPB Florida Power and was appraised of situation. Ehrmann stated that Florida Power had some recent thefts of small amts of rolled coins. They had contacted Ehrmann and he had placed a blue dye on the rolled coins of a drawer which was not

being used and was kept in the safe. He stated that SUS had no authority to have access to this drawer. On arrival WRITER found two blue dye finger prints on the safe and lifted these. WRITER noted no other blue dye prints on safe and drawer was removed from safe. Drawer with coins still had blue dye on the coins and WRITER noted no other dye in drawer. WRITER then observed blue dye on receiver of phone of B Martin's desk. Prints appeared to have been made by a left thumb on the receiver. WRITER and Ehrmann then interviewed B Martin at Florida Power. WRITER read Martin Miranda and post Miranda. Martin stated that she would talk to Ehrmann and WRITER. Martin stated that

she had not taken money before question was posed to her. When asked if she had access or any reason to go into the safe she stated that she had and explained that she had to go into the safe to remove her cash drawer and that she also had to place cash bags in safe. She stated that when she removed her drawer she did not touch inside the other drawer. She did state her drawer was not on top and that another drawer was on top and she had to move it, but that's all she did. She stated that her hands did not have ink on them and that if they did she works with ink pens all day. Ehrmann requested to see her hands and she showed her hands. WRITER observed her hands and she had no

observable ink on her right hand. The only observable ink which was on her hand was on her left thumb. Ehrmann then requested her to go with WRITER and have her finger prints taken which she agreed to. Martin was transported to Central by WRITER and prints were taken and submitted into evidence.

Martin had also been asked during interview if she would take a PSE test and she stated that she would not she stated there is no reason to as she did not do anything wrong. She also stated that she did not know if she would even come back to work for them and that she would be contacting her lawyer and they would be hearing from her.

Due to proximity of cash drawers in the safe and her ability to have access to the safe WRITER Can Not Justify a Criminal Charge of attempted Petit Theft, and sees it as an Internal Problem.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BRENDA MARTIN,

Plaintiff, Civil Case No. 90-858-CIV-T98B

v.

FLORIDA POWER CORPORATION,

Defendant,

MOTION FOR RECONSIDERATION

Plaintiff moves this court to reconsider its granting of Defendant's Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure §59(e) and as grounds for this Motion would state:

1. On January 16,1992, this court granted Defendant's Motion for Summary Judgment and entered judgment against Plaintiff and in favor of Defendant.

2. The court should reconsider the Facts and the Law as they apply to this case because

Plaintiff believes the Motion should be denied and this case allowed to go to trial.

I Hereby Certify that a copy of the foregoing has been furnished by regular U.S. mail on January 22, 1992, to: Lewis Sapp, 800 Peachtree, Cain Tower, 229 Peachtree Street,N.E., Atlanta, Ga. 30303.

STEPHAN J.FREEMAN,P.A.

STEPHAN J. FREEMAN
21 9th Street So.,
Suite 200
St. Petersburg, F133705
813-896-2286
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BRENDA MARTIN,
Plaintiff,

Civil Case No.
90-858-CIV-T98B

v.

FLORIDA POWER CORPORATION,
Defendant,

MEMORANDUM OF LAW IN SUPPORT MOTION FOR RECONSIDERATION

Plaintiff files this Memorandum of Law in support of her Motion for Reconsideration and states as follows:

1. As stated in the Motion, this court has granted Defendant's Motion for Summary Judgment on Counts I and II of Plaintiff's First Amended Complaint. The Plaintiff would first point out the law is clear that a Summary Judgment should not be granted for a count on retaliation since the primary

issue is one of intent and motive. See Romero v. Union Pacific Railroad, 615 F.2d 1303 (10th Cir. 1980). However, the court should look closer at the facts and the law and it will find that a summary judgment should not be entered against Plaintiff and in favor of Defendant.

2. The crux of this case is whether the discharge of Plaintiff was a pre-text for either discrimination or retaliation. The basis for Plaintiff's allegations that it was a pre-text is either 1) the investigation was concocted by Defendant or 2) the investigation was part of a normal procedure but was used illegally by Walter Fuller and Barbara Moore in order to get Plaintiff discharged.

3. As the facts show, there is a dispute over how the investigation started. Did it start from ongoing loss or a loss of one mere roll of quarters? The conduct of the investigation is in dispute and is relevant to Plaintiff's allegations. Were the coins dusted so that it was impossible to touch them except on purpose or could anyone picking up a tray touch the dusted coins? Were the trays placed such that only Plaintiff had to pick up the dusted tray (and as Plaintiff alleges) or was it placed in a random fashion and on more than one occasion (as Defendant alleges)?

4. Continuing conduct of the investigation is also in dispute

and is relevant. Why were the police called in ? The Plaintiff alleges, by virtue of the policeman's testimony, that no monies were discovered missing. It is Defendant's contention that a roll of pennies of $.50 were found missing. Was the necessity of a police investigation over zero missing monies or over $.50? Why couldn't that have been handled through a less extreme means?

As for the police investigation, it is unrebutted that the police felt that they could not prosecute and felt that they could not add to any investigation. Yet the Defendant pushed the requirement of a polygraph. The polygraph is inadmissible. Assuming Plaintiff had taken the polygraph and failed, what would that have meant?

That she had stolen $.50 ? Would FLORIDA POWER have fired or prosecuted an employee because an inadmissible polygraph indicated they had stolen $.50? of course not. A reasonable inference, which is all the Plaintiff has to prove, is that the investigation was concocted or a valid investigation was used illegally to discharge Plaintiff.

5. Why did Defendant tell Plaintiff that she was on unpaid leave pending investigation? This had not occurred in the prior investigation. Why would an employer ask an employee to take time off for an investigation of a missing $.50? Why did Defendant tell Plaintiff to go home until the investigation was complete and then turn around

and try to contact Plaintiff to help in the investigation? Why? Because Defendant, either concocted the investigation or used the investigation to illegally discharge Plaintiff. The Defendant knew through its employees that Plaintiff would not take a polygraph based on past performance and thus would set her up for discharge. Defendant knew that the conduct of the investigation, suspect as it was, and the tenor of the investigation, as if it were a major crime, would confuse and scare Plaintiff so as to prevent her from having her full faculties forcing her not to cooperate. Why did Defendant write certified letters, call the Plaintiff and

go to her house? It seemed an awful lot of trouble for an insignificant missing amount of money and an investigation not prompted by the police. Defendant knew that the constant badgering of Plaintiff would scare her and not allow her to cooperate. Why write letters that have inconsistent reasons for termination? To confuse and scare Plaintiff.

6. Some of these facts are in dispute and some are not. All can lead to a reasonable inference that there is a causal connection between the termination and the exercise of protected activity. These facts could allow a jury to reasonably find for the Plaintiff.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular U.S. mail on January 23, 1992, to: Mr. J. Lewis Sapp, 800 Peachtree, Cain Tower, 229 Peachtree Street, N.E., Atlanta, Ga 30303.

STEPHAN J. FREEMAN,P.A.

STEPHAN J. FREEMAN
21 M L King (9th) St So
Suite 200
St. Petersburg, Florida
33705
(813) 896-2288
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BRENDA MARTIN,
Plaintiff,
Civil Case No.
90-858-CIV-T98B

v.

FLORIDA POWER CORPORATION,
Defendant,

MEMORANDUM OF LAW IN SUPPORT CONCERNING DISPUTED ISSUES OF LAW

Plaintiff files this memorandum of Law in discussion of the disputed issues of law or issues of law to be determined as described in the Joint Pre- Trial Statement.

1. There are four issues of law to be determined by the court as described in the Joint Pre-Trial Statement. The law described in paragraph 1 is for the court to determine after hearing all the facts. Plaintiff

has determined that the statement of law in paragraph 2 is not applicable to this situation.

2. The third issue of law to be determined is whether a Plaintiff may rebut an articulated legitimate reason for discharge by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's probative explanation is unworthy of credence. That is the law as pronounced in Carter vs. City of Miami, 870 F.2d 578 (11th Cir. 1989). The second half of the issue of law in paragraph three is whether discrimination can be inferred from action. It is believed

that discrimination can be inferred from action as described in the following cases. Gemmell vs. Meese, 43 FEPC 1437 (E.D.TENN. 1986); Young vs. General Foods Corp., 840 F.2d 825 (11th Cir. 1988), Carter, supra. and Simmons v. Camden Cty. Bd. of Ed., 37 FEPC 797 (11th Cir. 1985).

3. The last issue of law to be determined is whether Plaintiff can infer pretext for retaliation by showing that the protected activity of the adverse action were not wholly unrelated. Simmons, supra indicates that is the law.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular U.S. mail this 15th day January, 1991 to:

Mr. J. Lewis Sapp, 800 Peachtree, Cain Tower, 229 Peachtree Street, N.E., Atlanta, Ga 30303.

STEPHAN J. FREEMAN,P.A.

Stephan J. Freeman
21 M L King (9th) St So
Suite 200
St Petersburg, Florida
33705
(813) 896-2288
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BRENDA MARTIN,
Plaintiff,
v.
FLORIDA POWER CORPORATION,
Defendant,

Civil Case No.
90-858-CIV-T98B

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff files this Memorandum of Law in support of her Motion for Reconsideration and states as follows:

1. This Memorandum of Law should be read together with the original Memorandum of Law served by Plaintiff in support of her Motion for Reconsideration.

2. In footnote nine of its Order, the court indicated that Barbara Moore, the employee of Defendant who discharged Plaintiff,had no knowledge of

Plaintiff's protected activities and thus the implication that there could be no retaliation. As was pointed out in response, Ms. Moore had access to Plaintiff's personnel files and at least the original 1986 internal discrimination claim would have been in that personnel file. Further, Ms. Moore began work in the district office with Plaintiff in January of 1987 and the latter discrimination complaint by Plaintiff was not resolved until March of 1987. The inference is that she knew of that complaint and thus the court should reasonable infer that there was knowledge of the protected activity and thus at least Plaintiff has proven

that portion of the retaliation claim.

3. There are a few other disputed facts that Plaintiff wishes to point out to the court that she believes are relevant to the issues. The June 15th and June 16th letters to Plaintiff from Ms. Moore and Mr. Fuller were received in one envelope and received on the same day, Saturday, June 18, 1988. While the court acknowledges that Plaintiff did attempt to contact Defendant concerning the investigation with the letter, it should be understood that not only was Plaintiff afraid of and confused by the employees of Defendant, she was instructed by her attorney to write the letter and communicate in only that

method. It is important to understand that, because the court should not get the impression that Plaintiff ignored Defendant. Rather, Plaintiff did not know how to respond but in the method that she did.

4. As part of Plaintiff's theory that the investigation was a conspiracy instigated by Henry Ehrman, it should be noted that Mr. Ehrman is the one that brought up the missing deposit of 1986 during the 1988 interrogation of Ms. Martin. That appears to be very relevant because it appears he did not forget that incident and could well have felt she was guilty of the 1986 incident but could

not be proven guilty.

5. Last, it should be noted that the safe was not locked at the time Plaintiff removed her tray and got the ink on her thumb. She did not have access to the locked safe and there has been no allegation to that effect. It is important to note that so as to avoid any inference that someone broke into the safe and got the ink on their thumb.

6. The disputed facts create a genuine issue that the court should allow to be heard with all testimony and evidence.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular U.S. mail on January 27, 1992 to: Mr. J.

Lewis Sapp, 800 Peachtree, Cain Tower, 229 Peachtree Street,N.E. Atlanta, Ga 30303.

STEPHAN J. FREEMAN,P.A.

Stephan J. Freeman
21 M L King (9th) St So
Suite 200
St Petersburg, Florida 33705
(813) 896-2288
Attorney for Plaintiff

MR. James R. Yates,
Director
Human Relations Department
175 5th Street North
St. Petersburg, Fla. 33701

RE: Brenda J. Martin v. Florida Power Corporation
CASE NUMBER:PC1086135/EEOC025863
876

Dear Mr. Yates:

Please be advised that Florida Power Corporation intends to fully comply with all conditions contained in the Negotiated Settlement Agreement signed on this date.

MARCH 18,1987
DATE

Sincerely,

EDNA C. JONES,MANAGER
AFFIRMATIVE ACTION PROGRAMS
FLORIDA POWER CORPORATION

cc: Miami District Office
Equal Employment Opportunity Commission
One Northeast First Street
Metro Mall- Sixth Floor
Miami, Florida 33132

INTEROFFICE CORRESPONDENCE

GULF BEACH DISTRICT (Office) GB-12 Mail CODE

SUBJECT: Clarification of the use of breaks for making up time

TO: All Gulf Beach Personnel

Date: May 5,1986

Breaks of 15 minute duration, once during the morning and once during the afternoon are given to you for use as breaks only. This time cannot be used to make up time.

If you have any questions, please see me.

W.R. Fuller

Handwritten Note at the bottom

This memo was given to all office personnel at Gulf Beach on Monday, May 5, after I requested a meeting with Walter Fuller(District Mgr). Per Edna Jones/EEOC Affirmative Action(Walter was allowing other employees to use break time)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BRENDA MARTIN,
Plaintiff,
v.
FLORIDA POWER CORPORATION,
Defendant,

Civil Complaint
Case No:90-858-CIV-T-98B

PLAINTIFF'S
FIRST AMENDED COMPLAINT

Plaintiff, Brenda Martin, sues Defendant, Florida Power Corporation, and states as follows:

FACTS COMMON TO ALL COUNTS

1. This is an action pursuant to 42 U.S.C. 2,000 e (1-17)

2. Defendant is a Florida Corporation with more than fifteen (15) employees.

3. Plaintiff was terminated as an employee of Defendant on June 21, 1988.

4. Plaintiff filed a complaint with the Equal Employment Opportunity Commission within

two years of the date of termination by Defendants.

5. Plaintiff received a Right to Sue Letter and filed suit within ninety (90) days of the date of the letter. A true and correct copy of this letter is attached as Exhibit "A".

6. The discrimination alleged in this amended complaint is the same discrimination described in the complaint filed with the EEOC.

7. Plaintiff has satisfied all timeliness requirements of 42 U.S.C. 2,000 e et. seq.

8. Plaintiff is a black individual.

COUNT I

1. Plaintiff realleges and reincorporates paragraphs 1 through 8.

2. This count is brought pursuant to 42 U.S.C. 2,000 e-2

3. Defendant discharged Plaintiff because of her race.

4. Plaintiff had satisfactory performance prior to discharge.

5. The incident that give rise to the termination is described in attached Exhibit B.

6. The investigation and demand for the polygraph test was a pretext by Defendant in order to set up a situation where the Plaintiff would appear to be insubordinate to Defendant and thus be terminated.

7. There was no theft of coins from Defendant's office, Plaintiff never stole any monies from that office nor was Plaintiff ever charged by any agency or person

with theft of coins.

8. Plaintiff was terminated despite her satisfactory performance.

9. Plaintiff was replaced with white person who had no better qualifications.

WHEREFORE, Plaintiff requests back pay, future pay, reinstatement, costs and attorney's fees.

COUNT II

1. Plaintiff realleges and reincorporates paragraphs 1 through 8.

2. This count is brought to 42 U.S.C. 2,000 e-3.

3. On at least two occasions prior to this incident, Plaintiff participated in a proceeding against Defendant with the EEOC. That was in March of 1987 and May of 1986.

4. Plaintiff's complaint in 1987 was protected under 42 U.S.C. 2,000 e et.seq.

5. Plaintiff was terminated by Defendant on June 21, 1988.

6. The events giving rise to the termination are described in attached Exhibit B.

7. Defendant set up both situations described in Exhibit B as a pretext to terminate Plaintiff in retaliation for filing the discrimination charge described above.

WHEREFORE, Plaintiff demands judgement against Defendant, for back pay, future pay, reinstatement, costs and attorney's fees.

Stephan J. Freeman,P.A.
Trial Counsel Fla. Bar#328286
21-9th Street South
Suite 200
St Petersburg, Fl 33705
(813) 896-2288

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BRENDA MARTIN,
Plaintiff,
v.
FLORIDA POWER CORPORATION,
Defendant,

CIVIL COMPLAINT
Case No.90-858-
CIV-T-98B

This action is brought pursuant to Title VII of the Civil Rights Act of 1964 for employment discrimination. Jurisdiction is specifically conferred on this court by 42 U.S.C. 2000 E-5. Equitable and other relief is sought under 42 U.S.C. 2000 C-5(g).

The acts complained of in this suit concern:

(A) Retaliation against Plaintiff
(B) Termination of Plaintiff

Defendant's conduct is discriminatory with respect to the following:

(A) Plaintiff's race or color

The facts surrounding Plaintiff claim of employment discrimination are:

The defendants created an investigation under fraudulent circumstances, then the defendants

used these fraudulent circumstances as an excuse for terminating me. In order to give the facts surrounding the Plaintiff's claim of discrimination, I must first give some background information. I was the only Black employee in the Florida Power Gulf Beach District Office, and had been since I was first employed (November, 1981) through my termination (June, 1988). Throughout my employment there, I received good (Competent) evaluations, yet I had been harassed on the job several times previous to this complaint. Two times previous to this present incident, I had filed complaints, once with Florida Power's Affirmative Action Department and a

second time with the City of St. Petersburg's Human Relations Department. In each of those two incidents, Florida Power was mandated to rectify my records. However, in retaliation against me, Florida Power created this present incident in order to get me terminated from my employment with them. This is what happened: This present incident was the second time that Florida Power had tried to "set me up" regarding monies. During the first time, my bank deposit had been verified by another Florida Power employee and the tape had been initialed by both me and the other employee. The initialed tape had been kept at the office and not sent to the bank (which was

normal procedure). However, after the deposit arrived to the bank, Florida Power was notified by the bank that the deposit was "supposedly" short by about $600. I was taken by the District Manager to the St. Petersburg Beach Police Department. I was interrogated by a detective and asked if I would take a polygraph test. I agreed and told the detective that I would take the test because I had done nothing wrong. However, because the Miranda Rights which the detective had read to me mentioned consulting an attorney, I decided to do so before continuing with this investigation. My attorney advised me that there was no need for a polygraph test because the police should go on

the evidence they already had (which was that the bank deposit tape had been initialed by another employee and the monies had been verified before going to the bank in a locked deposit bag and "supposedly" the bank was the only other ones with a key for the bag) and also my attorney stated to me that the polygraph would be inadmissable in court anyway. During the interrogation, the detective said, " I'm going to definitely arrest someone in this case." However, in the end, because it was realized I had not stolen any monies, the case was dropped. Since that "set up" against me was proven futile, Florida Power then initiated this second (present) set up.

This is what happened: there are three cash trays in the vault. As a normal process, in order to get our trays from the vault, it is sometimes necessary to remove another numbered tray that is flushed on top of yours (each employee has a permanent numbered tray assigned to her). The trays are opened (opened meaning no locks nor lids are used, accessible to any employee in the office, in a vault which is left opened all day), cash trays contain only coins while in the vault---paper monies are kept in numbered bags in the bottom of the vault. On that Monday (June 13, 1988), I had to remove the tray that was flushed on top of mine in order to get my tray. Of course

in order to lift the tray that was flushed on top of mine, I had to incorporate the use of my thumb in order to balance the tray and prevent the coins from falling out of it, because I used my other hand to lift my tray from underneath. Thus, this is where the attempted theft accusation investigation came into play. Because of the thumbprint, I was accused of attempted theft of the coins (however, during the interrogation by a St. Petersburg Beach police detective and Florida Power's security, it was proven and verified that no monies were missing from the tray flushed on top of mine ---these were the only two trays in the vault at the time, the other cashier had already taken out

the tray that had been on top of these two).

During the interrogation I asked if I could demonstrate to them the procedure I used in order to get my tray (which was normal procedure---and which the same procedure I had always used in my 6 ½ years employment with Florida Power). After my demonstration, Florida Power's security officer informed me that he had purposely come into the office the Saturday before and had set up the trays in the vault in a special order and had purposely put identification ink on the coins that were in the tray that was sitting directly flushed on top of my tray (which of course

was the tray I would have to remove in order to get to my tray). After my demonstration and showing them why my thumbprint was on the tray, I was informed that I was suspended from work until further notice. Also, the security officer told me that if the thumbprint proved to be mine (which of course I had just demonstrated to them that it would be mine and why it would be, plus the security officer had admitted that he had set up the trays so that my thumbprint would be there) that I would be terminated. (NOTE: The office is always closed on Saturdays). Then after this, I was informed by Florida Power's security (the

same security person who admitted to setting up the trays in this special order) that I needed to go over to the St. Petersburg Beach Police Department with the detective to be fingerprinted. I asked if I could drive my own car and was informed by them that I could not, that I would need to ride in back of the detective's car. At the police department, I was fingerprinted and then I asked them to photograph pictures of my hand to prove that only my thumb had ink on it (which I had already demonstrated why my thumb had the ink on it). After this, I was driven back to Florida Power's office by the detective so that I could get my car.

On Wednesday, June 15th, the

district manager and office supervisor came to my home, for what reason, I didn't know why; therefore, because I didn't trust them due to their devious actions of trying to set me up on the Monday before and because I was home alone, I did not answer the door. On Friday of the same week, I contacted an attorney for legal representation because I knew that once again I had been set up by Florida Power, and this time I had been suspended, and informed that I would probably be terminated. The attorney advised me not to talk with anyone from Florida Power because she said, "They cannot be trusted". The attorney said, "that if anyone from Florida Power tried to

contact me, then I needed to contact her before talking to them. The attorney also advised me to send Florida Power a letter informing them that any contact to me needed to be in writing per my attorney. I had informed the attorney that there was a note in my mailbox to pick up from the post office certified mail from Florida Power. She said,to pick up the certified mail and to send her copies of the information that it contained. The certified mail contained three letters in one envelope. Two of the letters, dated June 15, 1988 and June 16, 1988 were misleading and contradictive of each other. The June 15th letter stated "failure to

appear and cooperate with pending investigation would result in termination on the grounds of insubordination". The June 16th letter stated "failure to contact and comply with pending investigation would constitute quitting without notice". Florida Power indicated to EEOC in Tampa that I was terminated for failing to respond to respondent's contact request which Florida Power said, constituted insubordination. However, in fact I did contact Florida Power by mail per my attorney (and I have the return receipt which is dated June 20, 1988, a copy of which is attached. However, I was still terminated by certified mail in a letter dated June 21, 1988. Actually

I should not have been terminated because I did make contact after I received their first certified mail; however, if Florida Power did not want to acknowledge that I indeed did make contact with them, then their letter dated June 16th (please refer to the abovementioned June 16th letter contained in this paragraph) should have prevailed.

The alleged discrimination occurred on or about June,1988.

Plaintiff filed charges with the Equal Employment Opportunity Commission, Tampa, Florida on or about January, 1989.

The Equal Opportunity Commission issued a Notice of Right to Sue Letter (copy attached) which

was received by Plaintiff on or about April, 1990.

The reasons for questioning the Commission's determination are:

Plaintiff does not feel the commission adequately investigated the claim. They did not take into account that Plaintiff had previously been harassed by Florida Power, and that Florida Power was mandated by Florida Power's Affirmative Action Department and St. Petersburg's Human Relations Department to rectify my records. In retaliation, Florida Power set up two fraudulent incidents against me. Each incident against me (this present case being the second incident of set up) was proven to be without merit and was

discredited. However, in the meantime I have been terminated from my job that I had held for 6 ½ years, I have endured defamation of character, and have had to go through (and am still going through) physical and mental stress. They also did not take into account Plaintiff's good evaluations and the fact that there was never any mention of monies being attempted to be taken or taken. They also did not take into account that Plaintiff had received two misleading, contradictive letters in regards to contacting Florida Power in reference to the investigation. They also did not take into account that Plaintiff had indeed responded (by certified

mail) as requested by Florida Power.

If relief is not granted, Plaintiff will be irreparably denied rights secured by Title VII of the 1964 Civil Rights Act.

Wherefore, Plaintiff request that:

(A) The Court grant such relief as may be appropriate, including injunctive orders, damages, cost and attorney's fees.

Brenda Martin
Plaintiff Signature

Brenda Martin
Name

4126-31st St, So.
Address

St, Petersburg, Fl. 33712
City State Zip

Date: 7-11-90

(813) 867-0259
Telephone

LAW OFFICES OF
PATRICIA GRAHAM WILLIAMS,P.A.
1055 N.W. 183rd Street
Miami, Florida 33169
(305) 651-5400

BRENDA MARTIN
4126-31st Street South
St. Petersburg, Florida 33712

BILLING DATE
6-17-88
01-PGW-2
ACC'T NO.PGW00000277-3

RE: Telephonic Consultation
Previous Balance $0.00

PROFESSIONAL SERVICES
RENDERED INDIV

DATE
6-17-88 Telephonic Consultation
on 6-17-88 FEE $175.00

TOTAL FOR THE ABOVE SERVICES
TOTAL $175.00

PAYMENT RECEIVED
TOTAL PAYMENTS $0.00

AMOUNT DUE $175.00

(Plaintiff chk#0245,6-28-88)
Payment is Due Upon Receipt-Please
Make Check Payable To:
PATRICIA GRAHAM WILLIAMS,P.A.
****THANK YOU****

Pd in full, check#0245/Dated 6-28-88
Mailed 6-29-88

4126-31st St So
St.Pete., Fl 33712

Attention: Barbara P Moore(Supervisor)
Walter R. Fuller(District Manager),
& Florida Power Corporation,

I've been advised by my Attorney, if any of you wish to contact me, it need to be in writing (by mail only). I will not accept any phone calls or visits.

Sincerely,

Brenda J. Martin
6-17-88

(Florida Power Dated Stamp Received June 20,1988...Florida Power Corp Gulf Beaches)

Article Addressed To:

SPB Fl 33706, Fl Power Corp

Signature-Agent

Jill Haseltine

Date of Delivery

Jun 20 1988

Article Number

P782823600

Type of Service:

Certified

DOMESTIC RETURN RECEIPT

Florida Power Corporation

June 15,1988

Mrs. Brenda J Martin
4126 31st Street South
St Petersburg, Fl 33712

Dear Brenda:

In order to resolve the pending investigation in the Gulf Beach District Office as quickly as possible an appointment has been made for you. On Thursday, June 16,1988 at 10:00a.m. you are scheduled for a polygraph with the St. Petersburg Beach Police Department located at Police Headquarters at 7701 Boca Ciega Drive, St Petersburg Beach, Fl 33706. Failure to appear and cooperate with the pending investigation will result in termination on the grounds of insubordination.

Sincerely,

Barbara P Moore
Office Supervisor
Gulf Beach District

BPM:sp
cc:Mr. R.S. McCollum
Mr. W.R. Fuller
Ms. E.C. Jones

E-26

You need to contact us by Monday, June 20, 1988 by 5:00 p.m. (EST) and agree to have a polygraph test and fully cooperate with the pending investigation. Failure to contact and comply will constitute your quitting without notice.

Sincerely,

Walter R. Fuller
District Manager
Gulf Beach District Office

Barbara P.Moore
Office Supervisor

WRF/BPM:sp

Enclosure: Letter

Florida Power Corporation

June 16, 1988

Mrs. Brenda J. Martin
4126 31st Street South
St. Petersburg, Fl 33712

Dear Brenda:

We have attempted to contact you several times to deliver the enclosed letter. The dates, times and manner follow:

1. Wednesday,June 15,1988-10:50a.m.
   At your known residence of
   4126 31st St So
   St Petersburg, Fl 33712

2. Wednesday, June 15,1988-12:10p.m.
   At your known telephone number
   of (813) 867-0259
   Left message on answering machine

3. Wednesday,June 15,1988-2:30p.m.
   At your known residence of
   4126 31st St So
   St Petersburg, Fl 33712

4. Thursday,June 16,1988-8:20a.m.
   At your known residence of
   4126 31st St So
   St Petersburg, Fl 33712

5. Thursday, June 16,1988-8:50a.m.
   At your known telephone number of
   (813) 867-0259
   Left message on answering machine

Florida Power Corporation

June 21, 1988

Ms. Brenda J. Martin
4126 31st St. So.
St Petersburg, Fl 33712

Dear Ms. Martin:

Due to your failure to follow instructions to comply with the pending investigation, you are hereby terminated on the grounds of insubordination effective 8:00 a.m., Tuesday, June 21, 1988.

Please return all company issued items (i.e., Identification Badge, Benefits Manual, Accident Prevention Manual), by Thursday, June 30,1988.

Sincerely,

Barbara P.Moore
Office Supervisor
Gulf Beach District

BPM:sp

AMENDMENT I TO THE UNITED STATES CONSTITUTION

Congress will make no law to take away a person's Freedom of Speech, the right to say what he or she thinks.

AMENDMENT V TO THE UNITED STATES CONSTITUTION

Congress will make no law that makes a person be made to say anything against themselves in a Court of Law. People can not have their lives, freedom, or property taken away except according to the laws.

AMENDMENT VI TO THE UNITED STATES CONSTITUTION

Congress will make no law that denies any person accused of a crime, the right to be represented

by a Lawyer of their choice, to defend them.

SUMMARY JUDGMENT RULE 56

It is not the function of the Trial Court at the summary judgment hearing to resolve any genuine factual issue, including credibility; for purposes of ruling on the motion,all factual inferences are to be taken against the moving party and in favor of the opposing party, and the Appellate Court will do likewise in reviewing the Trial Court's grant of summary judgment. When the grant is not proper it is subject to reversal.

Supreme Court, U.S.
FILED
APR - 7 1994
OFFICE OF THE CLERK

No. 93-1404

In The

Supreme Court of the United States

October Term, 1993

BRENDA MARTIN,

Petitioner,

v.

FLORIDA POWER CORPORATION,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NANCY F. REYNOLDS
(Counsel of Record)

ELARBEE, THOMPSON & TRAPNELL
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Attorney for Respondent

April 7, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the courts below correctly ruled that the undisputed and uncontested factual background which led to Petitioner's termination, coupled with Petitioner's inability to present any evidence, other than unsupported speculation and conclusory assertions, toward establishing either a prima facie case of intentional discrimination or pretext mandated the entry of summary judgment as to Petitioner's claims of race discrimination.

2. Whether the courts below correctly ruled that Petitioner's speculation was legally insufficient to support an inference of retaliatory intent sufficient to prevent the summary dismissal of Petitioner's claim of retaliation, where Petitioner admitted to the factual background leading to her termination, acknowledged that the passage of well over a year's time weakened any inference of retaliation, and failed to present any evidence of causality.

PARTIES

Petitioner, Brenda Martin ("Martin"), is an individual resident of St. Petersburg, Florida.

Respondent, Florida Power Corporation ("Florida Power"), is a Florida Corporation with its principal place of business in St. Petersburg, Florida. Its parent company is Florida Progress Corporation, headquartered in St. Petersburg, Florida. Florida Power Corporation has no nonwholly owned subsidiaries.

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No. 93-1404

In The

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October Term, 1993

BRENDA MARTIN,

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v.

FLORIDA POWER CORPORATION,

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Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent Florida Power Corporation respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner Brenda Martin.

OPINIONS BELOW

On its non-argument calendar, the Eleventh Circuit Court of Appeals affirmed the trial court's entry of summary judgment, dismissing both of Martin's claims. Neither courts' opinion is published. They are reproduced in the appendix to Martin's Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the Court of Appeals on petition for certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The dispute in this case arises solely from the application of Fed. R. Civ. Proc. 56 to the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.* Despite Petitioner's claims, raised for the first time in her Petition, this dispute does not involve Amendments I, V, or VI to the Constitution of the United States. Petitioner Martin's claims do not allege any state action, but involve only private conduct by private actors. They do not, therefore, state a cause of action for which the United States Constitution affords relief. *See e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Lugar v. Edmondson Oil Company, Inc.*, 457 U.S. 922, 936-937 (1982).

STATEMENT OF THE CASE

The Proceedings Below

Petitioner Brenda Martin filed suit in federal district court in Florida alleging that Respondent Florida Power Corporation terminated her employment because of her race and in retaliation for filing prior charges of discrimination in violation of Title VII of the Civil Rights Act. After full discovery, Florida Power filed a motion for summary judgment, asserting that the undisputed facts established as a matter of law that Martin was terminated for her failure to cooperate in an internal investigation of missing monies – reasons unrelated to her race and/or her prior claims of racial discrimination. Florida Power's motion was based largely on facts stipulated by the parties in their joint pretrial order. In her opposition to the motion, Martin adopted Florida Power's statement of the facts and offered supplemental assertions, largely in the form of speculation. The district court granted summary judgment and dismissed Martin's case in its entirety.

Martin subsequently filed a motion for reconsideration, and thereafter filed both a memorandum and a supplemental memorandum in support thereof. Florida Power opposed this motion, noting that the motion was again without any evidentiary support. The district court denied Martin's motion for reconsideration, and Martin, proceeding for the first time *pro se*, appealed to the Eleventh Circuit. That court affirmed the judgment of the district court.

On May 19, 1993, Martin filed her Petition for Certiorari. By correspondence dated June 4, 1993, the Court rejected Martin's Petition as it failed to comply with the

Court's Rules of Procedure. After receiving notification from the Court that it considered the Petition to have been abandoned, Martin filed her corrected Petition in mid March 1994.

The Factual Record

Respondent Florida Power refers this Court to the Order of United States District Judge Ralph W. Nimmons, Jr. reproduced at pages B-1 through B-23 of the Appendix to the Petition for an accurate statement of the facts of this case.

Response to Martin's Statement of the Case

The "Statement of the Case" on pages 5 through 19 of Martin's Petition contains numerous assertions that are unsupported in the record, misleading, or irrelevant to this case.

For the first time in her Petition, Martin makes a number of allegations that her civil and constitutional rights have been violated. Martin states that a Florida Power employee "yelled at her to 'Shut Up, Be Quiet', he's handling this!" and that this statement violated her civil and constitutional rights. Petition, pp. 6-8. Similarly, Martin contends that the decisionmaker Moore violated her constitutional rights by refusing to intervene in a routine, workplace dispute between Martin and a co-employee. Petition, pp. 16-18. These alleged violations of Martin's civil and constitutional rights were neither resolved nor raised at any time in these proceedings until the filing of the instant Petition. As these contentions are

raised for the first time herein, they are not properly before this Court. Further, because they involve only private conduct by private actors, these assertions do not state a cause of action for which the United States Constitution affords relief.

Similarly, Martin's assertion that "Respondents stated on their depositions that the police dept. was conducting an investigation and Petitioner did not cooperate . . . was not a true statement" is misleading. Petition, p. 9. In making this statement, Martin is apparently again raising a contention, which was specifically addressed by the district court, that the investigation was conducted by Florida Power and not the police department. In addition, she appears to raise a new contention that her June 18 correspondence to Florida Power was "sent in 'Good Faith' " and not intended to be insubordinate. Petition, pp. 9-10, 13-14.

As to the first point, while Martin continues to make much of the fact that it was Florida Power, not the police, who conducted the investigation, that fact is not only irrelevant but it is also not in dispute. Indeed, in granting summary judgment, the district court found, "In May of 1988 *Florida Power* initiated another investigation". (R2-64-3). (Emphasis added.) Further, it is immaterial that Florida Power continued to investigate after the police determined not to bring formal, criminal charges because they deemed the matter to involve an internal problem. (*See* R2-37-3).

Martin's second, "good faith" contention is novel to this petition and indicative of Martin's tendency to raise new arguments and create new evidence where others

have failed. Because it is raised for the first time in this petition, it is not properly before this Court. In addition, it is not based upon any evidentiary support in the record, but mere supposition and opinion on Martin's part.

In addition, Martin now contends that Florida Power's failure to consider her letter as an appropriate response also violated her civil and constitutional rights. Martin apparently argues that, because the letter was sent in accordance with instructions from her attorney, Florida Power's rejection of that letter violated her right to counsel. Again, as this argument is made for the first time in this petition, it is not properly before this Court. Were it properly before this Court, it nevertheless fails as it concerns conduct by private actors for which the United States Constitution does not afford relief.

Martin's assertion that "the only time police was notified was when the Petitioner was supposedly the suspect" is also misleading. Petition, p. 11. The statement incorrectly and improperly implies that Florida Power was aware that Martin was somehow involved in instances of missing monies and that this knowledge prompted it to contact the police. The record evidence, in contrast, establishes that Florida Power never identified any specific suspect prior to police involvement. As to the investigation in 1986, that evidence establishes that Ehrman contacted the police because the amount of missing monies was large ($600) and that no one had identified a particular suspect to him. (R1-23-Ex.2, p. 6). The evidence further showed that Martin was one of five individuals who were questioned because each of the five had access to the missing funds. (R1-23-Ex.3, pp. 50-54; R1-23-Ex.4,

Defendant's Response No. 8 to Plaintiff's Fourth Interrogatories; R1-23-Ex.4, Defendant's Response Nos. 7 and 9 to Plaintiff's Third Interrogatories). Similarly, the police were contacted in the course of the 1988 investigation after unidentified blue fingerprints appeared on the door to the safe. It was not until the hands of all employees were checked that it was discovered that the fingerprints belonged to Martin. (R1-23-Ex.2, p.22; R1-23-Ex.1, pp. 26-28; R1-23-Ex.3, pp. 59-60).

Martin's contention that she "knows of another incident in '1987', where Jill Haseltine, a white female employee was short several hundred dollars . . . " is unsupported by affidavit or other evidence and contrary to Martin's prior statements. In fact, the allegation was raised in the form of argument for the first time in the body of Martin's appellate brief. (Brief of Appellant, pp. 7, 10). The facts alleged at that time and herein are contrary to the only record evidence on this point – Martin's statements to the Equal Employment Opportunity Commission. In those statements, Martin contended Haseltine had shortages of 50¢ and $20, which were occasioned by balancing errors in the calculator tape. She further admitted that the $20 error was discovered and that she does not know if the 50¢ was also found. (Defendant's Exhibit 21 to Plaintiff Depo.). [As Martin raised this issue for the first time on appeal, this evidence is not included in the record, but was made part of the Appendix filed by Appellee Florida Power.] Such admissions are further bolstered by Martin's deposition testimony that she believed only that there may have been balancing errors (as opposed to the documented

theft of coin rolls, which occasioned the 1988 investigation) of $20 on a couple of occasions, but that *she* never heard anything else about these incidents. (R1-23-Ex.3, p. 55). In fact, Martin's knowledge concerning these and other potential "losses" is based, not on any personal knowledge, but simply on the fact that she was not involved in other investigations. (R1-23-Ex.3, pp. 55-56).

Martin's contentions that her prior complaints of discrimination "were in Petitioner's office file in [the decisionmaker's] Moore's office", that one "could infer that [Moore] was very much aware of what was in the file" and that "when the '87' complaint was resolved, Moore gave the records to Edna Jones, Florida Power's EEOC Representative" are also without any evidentiary support and contrary to the evidence in the record. Petition, pp.14-15. *See* R1-23-Ex.3, pp. 29-30 (wherein Martin admits she has no personal knowledge as to the contents of her employment file). Indeed, the contention that Moore gave records to Jones appears for the first time in Martin's Petition; like the other assertions it is based upon conjecture, rather than record evidence. The undisputed, competent evidence in the record establishes, in contrast, that Moore was not familiar with Martin's prior complaints of discrimination and that she was unaware of any subsequent complaints, during the time that she supervised Martin (R1-23-Ex.1, pp. 6-8).

Finally, Martin claims that "the Courts decided in favor of Florida Power, stating that too much time has passed for a retaliation claim". Petition, p. 15. In its decision, the district court actually noted that Martin, in her opposition to summary judgment, acknowledged that a time lapse between the protected activity and the

adverse employment action weakens any inference of retaliation. R2-64-11; (R1-32-10-11). The court then went on to note that Martin's sole evidence of retaliation consisted of her theory that Florida Power waited this period of time before terminating her employment so that she would have a difficult time proving any subsequent claim of retaliation. The court also noted that Florida Power did not immediately terminate Martin after the dye was discovered on her hand, but undertook extensive efforts to contact her to cooperate in the investigation, and that it was only after Martin failed to indicate any willingness to cooperate that she was terminated. These undisputed facts, coupled with the absence of any competent evidence of causation or intent, properly led the court to order the dismissal of Martin's claim. *Id.*

SUMMARY OF ARGUMENT

1. **Race Claim**. A Title VII plaintiff alleging disparate treatment must prove that the defendant acted with discriminatory purpose. To prevail, a plaintiff must first establish a *prima facie* case of employment discrimination on the basis of race. As Martin's replacement is a member of the same protected group as she, to meet her *prima facie* burden she must have established that she was terminated for misconduct which was nearly identical to that engaged in by a non-protected group employee whom Florida Power retained. The undisputed evidence precluded Martin from making any such showing.

Since Martin was the only employee who had blue dye on her hand, she was the only employee required to

participate further in the 1988 investigation. Further, Martin was the only employee who refused to cooperate in any investigation. Indeed, the only Florida Power employee who arguably engaged in identical conduct was Martin herself, when despite her failure to cooperate with an investigation in September of 1986, she was nevertheless retained. Since there is no evidence of preferential treatment of a comparably situated white employee, Martin did not establish even a *prima facie* case of discriminatory discharge.

Assuming *arguendo* that Martin could meet this *prima facie* hurdle, she conceded that Florida Power has articulated a legitimate, nondiscriminatory rationale for her termination (R1-32-5). The articulation of this rationale destroys any presumption of race-based discrimination created by any *prima facie* showing. Thus, to preclude the entry of summary judgment for Florida Power, Martin must have shown by a preponderance of the evidence that the reasons articulated by Florida Power were a pretext for illegal discrimination. Martin offered no evidence to support or suggest pretext and did not even dispute the factual basis which resulted in her termination. Martin's sole contention, raised for the first time in her Petition, is that her letter was a "good faith" response to Florida Power's repeated and diligent efforts to obtain her cooperation in its investigation. As Martin's opinion is without evidentiary support and as it merely questions Florida Power's legitimate business judgment, it is not competent to withstand summary dismissal of her claim.

Apparently cognizant of her inability to produce any evidence whatsoever of disparate treatment or pretext, Martin attempts to avoid the application of Rule 56 by

challenging the facts of Florida Power's investigations over missing funds. Such testimony consists solely of conclusory and hypothetical allegations without record support and is, thus, legally insufficient to raise any inference of pretext or intentional discrimination. As Martin failed to produce evidence sufficient to meet any of the essential elements of her claims of race discrimination, the district court properly granted summary judgment.

2. **Retaliatory Discharge Claim.** To establish even a *prima facie* case of retaliatory discharge, Martin must have shown a causal connection between her protected activity and her termination. Martin was terminated almost 15 months after the final conciliation of her charges. Having acknowledged in opposition to summary judgment that a lengthy passage of time weakens any possible inference of discrimination, she now contends that the interval should be measured from her disagreement with Moore over her 1987 evaluation (some eight months). Her argument is misplaced, however, as the interval measured is that between the protected conduct and the adverse employment action. Because Martin has at no time contended that the disagreement over the evaluation involved either her race or prior claims of discrimination, it does not constitute protected conduct. Other than her argument that the time frame should be shortened, there is no evidence of causality except the fact that her separation chronologically followed her protected conduct. Such evidence is legally insufficient to support an inference of retaliation.

Further, as previously noted, Martin not only conceded that Florida Power articulated legitimate, nondiscriminatory reasons for her termination, but also admitted to the facts which led to the termination decision. As Martin failed to present any competent evidence, much less the required preponderance, to establish the essential elements of her *prima facie* case or to prove retaliatory intent, the district court's grant of summary judgment was proper.

ARGUMENT

There exists no compelling reason to justify the granting of a writ of certiorari in this case. As will be discussed below the lower courts fully considered the record evidence and correctly applied established law to the issues. The decision in this case is not in conflict with the either the decisions of the United States Supreme Court or the decisions of the various courts of appeals. The decision does not depart from the accepted and usual course of judicial proceedings, nor does it sanction such a departure by a lower court, as to call for an exercise of the Court's power of supervision. Finally, the decision in this case involved no important question of federal law which has not been, but should be, settled by this Court, nor did it decide a federal question that conflicts in any way with the applicable decisions of this Court.

Race Claim

To establish even a *prima facie* case of racial discrimination, Martin must have introduced evidence sufficient

to create an inference that her termination decision was based upon a factor prohibited by Title VII. *E.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). As the parties stipulated that, subsequent to Martin's termination, her position was abolished and a similar position filled by a black female (R2-43-9), the lower court properly determined that Martin must have established that "the misconduct for which [she] was discharged was nearly identical to that engaged in by an employee outside the protected class whom [Florida Power] retained." *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1185 (11th Cir. 1984), *reh'g denied*, 747 F.2d 710 (1984); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

Martin failed to produce *any* evidence that she was terminated for insubordination while other employees, who engaged in identical conduct, were retained. In fact, as noted by the district court, the undisputed record evidence actually precluded Martin from making any such showing. While Martin alone was questioned with regard to the loss of funds in 1988, such evidence lacks the required similarity to be of any legal consequence. At the time of this investigation, the record established that the hands of all employees were checked for blue dye, but none other than Martin's evidenced the presence of dye. As a matter of law, therefore, Martin was not similarly situated to the other branch employees so as to raise any inference of discrimination. *Nix*, 738 F.2d at pp. 1185-87. Further, the evidence established that Martin was not only the sole employee found to have blue dye on her hand, but she was also the only employee who refused to cooperate in any investigation over missing

funds. Indeed, the only employee who arguably engaged in such identical conduct was Martin herself – when two years earlier she failed to fully cooperate in another investigation, but was retained.

Having failed to present any evidence to the district court of the required disparity, for the first time on appeal (and again for the first time in the instant Petition) Martin attempted to create examples of such disparity. Martin has now argued both that Florida Power involved the police only when she was a suspect in an investigation and that employee Haseltine experienced large losses of funds, which were not investigated. As these matters were not presented for consideration by the lower courts, they are not properly before this Court. *See e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976).

Additionally, as noted *supra* in Respondent's Response to Martin's Statement of the Case, these assertions are unsupported by affidavit or other evidence and raised only in the form of argument for the first time in the body of Martin's briefs.

Martin has failed to produce – at either the summary judgment stage, reconsideration stage, on appeal, or in the instant Petition – any competent evidence in support of these speculative assertions. They are, therefore, legally insufficient to raise any inference of pretext or intentional discrimination. *Carter v. City of Miami*, 870 F.2d 578 (11th Cir. 1989); *Castle v. Sangamo Westin, Inc.*, 837 F.2d 1550 (11th Cir. 1988); *Elliott v. Group Medical & Surgical Service*, 714 F.2d 556, 564 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

Martin's conclusions are, further, contrary to the record evidence in this case. Contrary to Martin's argument that Florida Power involved the police only when she was a suspect, the undisputed evidence established that Florida Power never identified any specific suspect prior to police involvement. As to the 1986 investigation, that evidence established that police were contacted because the amount of money missing was large and that no particular suspect had been identified. (R1-23-Ex.2, pp. 8-10)[1]. The evidence further showed that Martin was one of five individuals who were questioned because each of the five had access to the missing funds. (R1-23-Ex.3, pp. 50-54; R1-23-Ex.4, Defendant's Response No. 8 to Plaintiff's Fourth Interrogatories; R1-23-Ex.4, Defendant's Response Nos. 7 and 9 to Plaintiff's Third Interrogatories). In the 1988 investigation, the police were contacted after unidentified blue fingerprints appeared on the door to the safe. It was not until after the police arrived that the hands of all employees were checked and that it was discovered that the fingerprints belonged to Martin. (R1-23-Ex.2, p.22; R1-23-Ex.1, pp. 26-28; R1-23-Ex.3, pp. 59-60).

Martin's contention concerning employee Haseltine not only contradicts undisputed record evidence but is also contrary to Martin's prior statements to the Equal Employment Opportunity Commission and her own

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[1] Because this contention is newly raised herein, portions of the cited testimony from Ehrman's deposition are not in the record. Should the Court find it necessary to review this testimony, Respondent will gladly submit same for review.

deposition. In those statements, Martin contended Haseltine had small shortages occasioned by balancing errors, not theft. She further admitted that her information concerning these and other potential "losses" was based, not on any personal knowledge, but simply on the fact that she was not involved in other investigations. (R1-23-Ex.3, pp. 55-56).

Moreover, the comparative evidence in the record established that Florida Power investigated non-protected group members with access to funds and required those employees to fully cooperate in its ongoing investigations. In the course of its 1986 investigation at least one other Florida Power employee, MacBroom, a white person, was investigated along with Martin (and three bank employees). Indeed, the undisputed evidence established that MacBroom even agreed to polygraph testing upon request by Florida Power. In the course of its 1988 investigation, Florida Power first dusted trays at a time when Martin was not even in the office. Further, the hands of *all* branch employees were checked for the presence of dye.

Finally, Martin's theories as to the reasons for and manner of investigations are irrelevant. As correctly found by the lower courts, Martin was terminated, not as a result of any investigation, but because of her failure to communicate a willingness to cooperate in an investigation, despite repeated and numerous attempts by Florida Power to obtain her cooperation. It is mere speculation to assume that Martin would have been terminated had she in fact cooperated with that investigation. Thus, it was not "but for" or "because of" the investigation that Martin was discharged; rather, Martin's termination resulted

from and *because of her failure to cooperate in the investigation.* As Martin's termination occurred because of *her active* refusal to cooperate, it was not occasioned because of her race – thereby precluding recovery on this claim. *McCarthney v. Griffin-Spalding County Board of Education,* 791 F.2d 1549 (11th Cir. 1986).

As a result, there is a complete absence of evidence from which to infer that Martin was terminated because of her race. Inasmuch as Martin failed to establish even a *prima facie* case of racial discrimination, summary judgment was correctly granted to Florida Power. Assuming *arguendo* that Martin's evidence supported a *prima facie* showing, the lower courts found that summary judgment was nevertheless warranted as Florida Power established legitimate, non-discriminatory reasons for the termination *and* as the record contained no competent evidence which even remotely suggests that those reasons were a pretext for illegal discrimination. *See Young v. General Foods Corporation,* 840 F.2d 825, 828-29 (11th Cir. 1988), *cert. denied,* 488 U.S. 1004 (1989); *accord, Mauter v. Hardy Corp.,* 825 F.2d 1554, 1558 (11th Cir. 1987).

As even Martin admitted, Florida Power articulated legitimate, nondiscriminatory reasons for her termination – her failure to cooperate or communicate her willingness to cooperate in an ongoing investigation. In light of such evidence, it was incumbent upon Martin to show that Florida Power's proffered reasons were not only a pretext, but a *pretext for illegal discrimination. Burdine,* 450 U.S. at p. 259; *St. Mary's Honor Center v. Hicks,* ___ U.S. ___, 125 L.Ed.2d 407 (1993). As the lower courts correctly found, Martin not only failed to provide such evidence

but, indeed, did not even dispute the facts which resulted in her termination.

Martin admitted that she refused to acknowledge or respond to Florida Power's repeated efforts to contact her until she received its certified correspondences that her failure to communicate her agreement to cooperate in the investigation would result in her termination. She admitted that she was fully aware, once she finally picked up these letters, that her job was in serious jeopardy. Nevertheless, Martin's only response was her June 18th letter, which notified Florida Power that any contact with her must be by mail. As noted by the lower courts, such communication, on its face, failed to evidence agreement or willingness to cooperate (R1-23-Ex.3, pp. 66-67, 70-74, 78-80, 94-95, 102; R1-23-Ex.3, Defendant's Ex. 8).

As her only "evidence" of pretext, Martin now contends that this communication should have been accepted as a "good faith" contact. Martin asserts that, despite already having unsuccessfully attempted personal, telephone, and written communication, Florida Power should have sent yet a third letter seeking her cooperation rather than terminating her employment. Martin's argument is misplaced, however, as is does no more than question the business judgment of Florida Power. It is, therefore, clearly insufficient to raise any issue of fact. *Nix v. WLCY Radio*, 738 F.2d 1181, 1187 (11th Cir. 1984). Because Martin wholly failed to carry her burden of establishing that her termination was because of her race, summary judgment was appropriately entered on her claim of discriminatory discharge.

Retaliatory Discharge Claim

To establish even a *prima facie* case of retaliatory discharge, Martin must have shown a causal connection between her protected activity and her termination. *Bigge v. Albertsons, Inc.*, 894 F.2d 1497, 1501 (11th Cir. 1990). Martin was terminated almost 22 months after filing her last charge alleging discrimination and 15 months after the final conciliation of that charge. Having acknowledged in opposition to summary judgment that a lengthy passage of time weakens any possible inference of discrimination, she now contends that the interval should be measured from her disagreement with Moore over her 1987 evaluation (some eight months). Her argument is misplaced, however, as the interval measured is that between the protected conduct and the adverse employment action. Because Martin has at no time contended that the disagreement over the evaluation involved either her race or prior claims of discrimination, it does not constitute protected conduct. Save her argument that the time frame should be shortened, there is no evidence of causality other than the fact that her separation chronologically followed her protected conduct. Such evidence is legally insufficient to support an inference of retaliation. *See e.g., Fuchs Baking*, 43 Fair Empl. Prac. Cas. (BNA) 752, 760 (S.D. Fla. 1987).

Further, as previously noted, Martin not only conceded that Florida Power articulated legitimate, nondiscriminatory reasons for her termination, but also admitted to the facts which led to the termination decision. As Martin failed to present any competent evidence, much less the required preponderance, to establish the

essential nexus element of even her *prima facie* case or to prove retaliatory intent, the district court's grant of summary judgment was proper.

While Florida Power contended that the evidence established that the decisionmaker in this case, Moore, had no knowledge Martin's complaints of discrimination (R1-23-Ex.1, pp. 6-8), the lower courts' decision did not rely on this basis. Martin's contentions of knowledge, while unsupported and contrary to the record evidence, are not relevant to this proceeding.

CONCLUSION

Florida Power presented incontrovertible evidence affirmatively demonstrating that Martin was unable to establish the existence of every element essential to her claims and on which she would bear the burden of proof at trial. This showing having been made, the lower court properly shifted to Martin the burden of going beyond the pleadings by identifying *specific, competent* evidence from which a trier of fact could reasonably find for the plaintiff, by demonstrating the existence of a genuine issue for trial. As properly determined by the lower courts, Martin fell far short of carrying this burden. For this reason, the lower courts did not err in granting and affirming summary judgment for Florida Power. *Celotex*

Corp. v. Catrett, 477 U.S. 317, 323-24, 331 (1986); Fed. R. Civ. P. 56.

Respectfully submitted,

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